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Briefadvies inzake Het streven naar onafhankelijkheid van de Koerdische Autonome Regio in Irak in het licht van de Montevideo-criteria

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ADVISORY COMMITTEE ON ISSUES OF PUBLIC INTERNATIONAL LAW

ADVISORY LETTER ON

**The aspirations for independence by the
Kurdish Autonomous Region of Iraq in the
light of the Montevideo criteria**

CAVV ADVISORY LETTER NO. 31

THE HAGUE

APRIL 2018

Members of the Advisory Committee on Issues of Public International Law

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1. INTRODUCTION

This advisory letter is a response to the House of Representatives' request to the Advisory Committee on Issues of Public International Law (CAVV) for advice on 'the aspirations for independence by the Kurdish Autonomous Region of Iraq in the light of the Montevideo criteria.'¹

The CAVV has divided this request for advice into a number of sub-topics:

- A. the substance and role of the Montevideo criteria;
- B. the role of the right of self-determination and the legality of a possible unilateral secession;
- C. the role and legal implications of recognition by other states.

This advisory letter addresses each of these sub-topics in turn, in the light of the situation in the Kurdish Autonomous Region (KAR). The content of this advisory letter was drafted by CAVV members Dr. C.M. Brölmann, Dr G.R. den Dekker, Professor L.J. van den Herik, Dr A. de Hoogh and Professor J.G. Lammers. It was adopted by the CAVV on 18 April 2018.

This advisory letter is intended to identify the legal standards and principles that are relevant to these topics and to use them to outline the applicable legal framework. It is important to note that the three topics cited above to a certain extent constitute three distinct legal discourses, which do not always dovetail perfectly with one another. Nevertheless, together they constitute the legal framework within which political considerations and choices must be made, for instance in relation to the KAR. With regard to those political choices: the CAVV's aim is not to establish whether the Kurds are a 'people' with the right of self-determination; whether the KAR should be permitted to, or indeed must be able to, become an independent state; whether the Kurdish Region includes the 'disputed territories'; whether it ought to or must include parts of Iran and Turkey as well; whether effective control is exercised over the KAR and, if so, by whom. Reaching an opinion on these points involves in part considerations of a non-legal nature, and in this respect the CAVV aims to exercise restraint.

In a similar vein, sooner or later, aspiration for independence by a group that is distributed over the territories of multiple states (like the Kurdish population, spread over Iraq, Iran, Turkey and Syria) may have implications for territorial integrity and for respect for existing international borders. The question of whether political stability in the region and international affairs would ultimately benefit from any major changes, or would actually be better served by maintaining the status quo, is not one that can be answered purely on the basis of international law.

¹ Parliamentary Papers 32 623, no. 199; Letter of 15 March 2018 from the Presidium.

It should also be noted for the record that where this advisory letter refers to 'legality', this means legality under international law, not under any country's domestic law, unless stated otherwise.

With respect to the facts, the CAVV has based its advisory letter *inter alia* on the summary given by the Minister of Foreign Affairs and the Minister of Defence in their letter to parliament of 24 October 2017.²

A few facts should be recalled at the outset: on 25 September 2017 a referendum on Kurdish independence was held in the Kurdish Autonomous Region and parts of the disputed territories that are under Kurdish control, including Kirkuk and the province of Nineveh. The question on the ballot paper was: 'Do you want the Kurdistan Region and the Kurdistan areas outside the region's administration to become an independent state?'.³ Kurdistan's electoral commission announced that turnout was approximately 78 per cent and that 93 per cent of the votes cast were in favour of an independent Kurdistan.

The referendum was called by the leadership of Iraqi Kurdistan and the aim was to secure a mandate for further negotiations with the Iraqi government. The referendum was not binding under constitutional law because it was 'held without the approval of the Iraqi government, which branded both the referendum and its result as unconstitutional, among other reasons based on a judgment of the Supreme Court'.⁴ At the time of writing (April 2018) the Kurdish authorities have not followed up on the referendum result by unilaterally declaring independence.

2. MONTEVIDEO CRITERIA AND OTHER CONDITIONS

According to the traditional doctrine, a 'state' exists under international law if the conditions set out in article 1 of the 1933 *Convention on the Rights and Duties of States*,⁵ better known as the Montevideo Convention, are fulfilled:

- a permanent population;
- a defined territory;
- government;
- the capacity to enter into relations with the other states.

² Parliamentary Papers, House of Representatives (2017-2018) 32 623, no. 178.

³ Translation by CAVV.

⁴ Parliamentary Papers, House of Representatives (2017-2018) 32 623, no. 178 as cited above, p. 2 [translation CAVV].

⁵ Convention on the Rights and Duties of States (signed at Montevideo, 26 December 1933), 165 LNTS 19.

These are objective criteria, but need not be fulfilled in an absolute sense: a border dispute need not impair statehood, nor should a nomadic (and therefore not entirely permanent) population. Neither does a state cease to exist if the government (temporarily) loses control over part of the territory. With respect to territory, there must be a defined claim and the population must be more or less clearly identified. With respect to 'government', it is important to determine whether it is *effective* (see below).⁶ In addition it is generally considered important that the 'government' will be able to maintain its position in future. The fourth characteristic refers to whether an entity has the legal capacity, rather than *de facto* capacity, to enter into international relations (see the section on recognition below). For instance, it could be argued that Scotland currently fulfils the first three criteria set out in the Montevideo Convention, but because it is still part of the United Kingdom it does not have the capacity to enter into international relations independently.

A further general comment should also be made regarding the Montevideo criteria. These criteria were laid down in 1933 to delineate the scope of the Montevideo Convention. The aim of these criteria, which are now generally taken to be part of customary international law, is to determine whether an entity *is already* an independent state, not whether a developing entity is capable of *becoming* a state. These origins explain why the criteria can be difficult to apply in the present day, particularly if the fourth characteristic is set as a 'condition' for aspiring states that are currently developing; there is a certain degree of circularity involved here, since – quite apart from the issue of the *political willingness* of third states to enter into diplomatic relations or treaties with a new entity (see section 4 on recognition) – international law does not in principle attribute the *capacity* to enter into diplomatic relations and treaties until a state exists as such. It can therefore be concluded that the fourth characteristic ('capacity to enter into relations with other states') does not function as an independent element in the way that the first three criteria do in relation to the *creation* of states, but rather in the identification of an *existing* state.

Finally, it should be noted that if a territory, such as the KAR, has characteristics that fulfil the Montevideo criteria, this does not automatically mean that the region is an independent state. There also has to be an intention to be an independent state. In this respect, the course adopted by the Dutch government at an earlier stage⁷ – i.e. that no assessment of whether or not the Montevideo criteria are fulfilled needs to be made unless a declaration of independence is issued – is correct.

Furthermore, an actual declaration of independence would only be the starting point of a process, and would need to be followed up by a number of further steps. For example, it may be expected that a declaration of independence would be underpinned by attempts by the 'new' authorities to extricate themselves from the *de jure* and *de facto* control of the central

⁶ See A. Nollkaemper, *Kern van het Internationaal Publiekrecht* (The Essence of Public International Law) (7th ed. Boom, 2016), Rn 84; W. Werner, 'De Staat' (The State), in N. Horbach, R. Lefeber and O. Ribbelink (eds.), *Handboek Internationaal Recht* (Handbook on International Law) (Asser, 2007), p. 165.

⁷ Parliamentary Papers 32 623, no. 178 as cited above, p. 5.

authorities; in other words, a declaration would be followed by the adoption of a constitution for the new entity, refusal to continue to accept the control of the central authorities and an attempt to obtain control over the territory. An existing state is not obliged to accept a declaration of independence by a section of its population in part of its territory and – within the boundaries of the law – (see section 3) can and may take measures to preserve the territorial integrity of the state.⁸ The question of whether a new state has (at any point) come into existence leads back to the Montevideo criteria. An important factor in identifying the characteristics of a state is whether the ‘central’ authorities are able to maintain or restore control or whether they have actually lost control; it is also required that the control of the ‘new’ authorities is effective, which implies ‘stability’ (often this can be established only after a certain amount of time has passed). When forming an opinion on this point, one important consideration will be the extent to which the population of the ‘newly’ declared state supports its independence.

Over the past few decades a new condition for the lawful creation of states has emerged in international law doctrine, as confirmed by the International Court of Justice (ICJ) in its Advisory Opinion on Kosovo,⁹ namely that the process by which a state is created must not be accompanied by violations of fundamental principles of international law, in particular of peremptory norms of international law (*jus cogens*). Specific examples include mass or gross human rights violations or the unlawful use of force. An aspiring new state will not have been lawfully created in such cases. Such violations would pre-empt the formation of a new state and as a result other states would be obliged to withhold their recognition (see section 4).

In principle, an infringement of the territorial integrity of an existing state does *not* constitute such a serious violation of international law. This means that unilateral secession, i.e. secession without the agreement of the central state government, is not necessarily illegal under international law (see also section 3). In its Advisory Opinion on Kosovo the ICJ also adhered to a restrictive interpretation of the principle of ‘territorial integrity’ as being confined to the sphere of relations between states – which implies that the principle cannot by definition be violated by non-state actors (such as peoples who aspire to form a state).¹⁰

⁸ See the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* of 1970 (UN Doc. 2625 (XXV)), which states in respect of the right of self-determination that ‘[n]othing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States ...’

⁹ *Accordance With International Law Of The Unilateral Declaration Of Independence In Respect Of Kosovo*, ICJ Advisory Opinion of 22 July 2010. See paragraph 81 of the advisory opinion: ‘...the illegality attached to the declarations of independence thus stemmed [...] from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*).’

¹⁰ See the Advisory Opinion on Kosovo, paragraph 80.

However reasonable criticism has been levelled against this interpretation, which some regard as too narrow.¹¹

3. SELF-DETERMINATION AND UNILATERAL SECESSION

Besides the Montevideo criteria, the doctrine of self-determination is also relevant to the situation of the KAR. All peoples have the right of self-determination, which in a general sense entails the free pursuit of their 'economic, social and cultural development'.¹² Under international law, the term 'people' is defined using largely factual criteria, some of them objective (for instance ethnicity, tradition, language) and some subjective (self-identification as a community).¹³ It is therefore possible that within a state's borders there can be a 'people' that does not encompass its entire population. The fact that a population group within a particular state has ties with population groups in other states – as for instance the Kurds in Iraq have ties with Kurds in Turkey, Syria and Iran – does not as such detract from the possibility for a group within a particular state to identify itself as a 'people' in a sense relevant to international law.

It follows from the foregoing that 'the KAR' as such is not the entity to which the right of self-determination may apply – this right accrues to peoples.

Under current international law, the right of self-determination is in principle exercised within the borders of existing states: the right of 'internal self-determination' is therefore the rule.¹⁴ Only in exceptional circumstances can a right of 'external self-determination' arise and at that point lawfully override the territorial integrity of the state. Such a right to secession exists in the situation of colonisation¹⁵ or foreign subjugation, domination or exploitation outside a colonial context.¹⁶

¹¹ See for example S.F. van den Driest, 'From Kosovo to Crimea and Beyond: On Territorial Integrity, Unilateral Secession and Legal Neutrality in International Law', 22 *International Journal on Minority and Group Rights* 2015, 467.

¹² See the identically worded article 1 of the International Covenant on Civil and Political Rights and article 1 of the International Covenant on Economic, Social and Cultural Rights of 1966; see also the preamble to the United Nations Charter.

¹³ There is no legal definition of the concept of 'people'. An authoritative unofficial definition is as follows: a people is a group of persons with a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection, or a common economic life with the will to be identified as a people and the consciousness of being a people ('Kirby definition', *International Meeting of Experts on further study of the concept of the rights of peoples: Final Report and Recommendations*, UNESCO doc. SHS-89/CONF.602/7, pp. 7-8. (1998)).

¹⁴ Article 1 of both of the 1966 Covenants. See also Supreme Court of Canada in para. 126 of Reference re Secession of Quebec (1998): '...a people's pursuit of its political, economic, social and cultural development within the framework of an existing state'; in a similar vein, see the *African Commission on Human and Peoples' Rights* in the Katanga decision (1994); see also ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory ('The Wall')*, Advisory Opinion, paragraphs 88 and 118.

¹⁵ See Resolution 1541 of the [United Nations] General Assembly (15 December 1960).

¹⁶ *Secession of Quebec*, paragraph 133; and *The Wall*, paragraph 87.

It is also sometimes argued that if a people's right of self-determination *within* the borders of the state is denied to it, external self-determination gives rise to a positive right of secession, which is sometimes categorised as 'remedial secession'.¹⁷ This is a disputed category¹⁸ due to divergences in legal opinion and in practice.¹⁹ Under international law as it currently stands, there does not appear to be general support for the existence of a right of secession outside the context of colonisation or occupation.²⁰

In this connection it should be noted that – for example – the Netherlands, with respect to the recognition of Kosovo in 2008, actually raised this third category of remedial secession and also cited an alternative basis for it: 'such a secession is permitted if (a) there has been a prolonged and gross violation of the right of internal self-determination and all possible options for effectuating the right of self-determination within the international borders of the state have been exhausted, or (b) there have been gross and widespread violations of fundamental human rights.'²¹ At the same time the Netherlands observed that '[...]Kosovo's declaration of independence must be seen as a *sui generis* case that does not create a precedent. There is also international agreement on this point.'²²

International law as it currently stands therefore acknowledges three categories of unilateral secession: the first is *illegal* secession, which is accompanied by a serious violation of international law (as is generally accepted to have occurred with respect to Northern Cyprus and the Crimea); this violation (see section 2) acts as a legal barrier to what would otherwise amount to the creation of a state on the basis of factual criteria. The second category is unilateral secession based on a *positive right* of a people in the context of the right of self-determination (as in the many examples of decolonisation from the 1960s until the 1980s). There is also a third, broad category of situations in which no right of secession exists, but where secession (or an attempt at secession) also is not illegal under international law.²³ For this reason the ICJ ruled in its Advisory Opinion on Kosovo that there is no rule of international law that prohibits a declaration of independence.

¹⁷ External self-determination is cited, conditionally, as a remedy of last resort for a violation by the state of the right of internal self-determination in paragraph 134 of the *Quebec* reference, but referred to more categorically in paragraph 138.

¹⁸ See also Advisory Opinion on Kosovo, paragraph 82.

¹⁹ S.F. van den Driest, 'Crimea's Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law', 62 *Netherlands International Law Review* (2015) 329.

²⁰ S.F. van den Driest, *Remedial Secession: A right to external self-determination as a remedy to serious injustices*, Antwerp: Intersentia 2013.

²¹ Letter to parliament on the recognition of Kosovo (Parliamentary Papers, House of Representatives 2007-2008, 29479, no. 8); see also the *Written Statement of the Kingdom of The Netherlands* submitted in the Kosovo case (17 April 2009). In paragraph 82 of the Advisory Opinion as cited above (see footnote 17), the Court observed that the states taking part in the proceedings had expressed radically different positions on this point.

²² Letter to parliament on the recognition of Kosovo (Parliamentary Papers, House of Representatives 2007-2008, 29479, no. 8).

²³ See S.F. van den Driest, 'From Kosovo to Crimea and Beyond: On Territorial Integrity, Unilateral Secession and Legal Neutrality in International Law', 22 *International Journal on Minority and Group Rights* 2015, 467; and M. Milanovic, 'A Footnote on Secession', in *EJIL Talk!* (<https://www.ejiltalk.org/a-footnote-on-secession/>).

Whether or not a unilateral secession by the KAR could be lawful would ultimately depend on how the facts were framed and assessed in the context of the doctrines set out above. In the context of the aspiration for *internal* self-determination, it can be noted as a matter of fact that the Iraqi constitution of 2005 sets out the contours of an autonomy arrangement for the KAR.

Finally, if it is accepted that a right of *remedial secession* exists in the broad sense, i.e. in response to both human rights violations and the denial of internal self-determination, then the question would arise as to whether the situation in the KAR attains the threshold of sufficiently serious human rights violations or of obstruction of internal self-determination.

4. RECOGNITION AND LEGAL CONSEQUENCES

The third doctrine relevant to this request for advice is that of recognition. In international relations this pertains to the recognition of states and not of governments, since it is the state that has legal personality under public international law. This does not detract from the fact that states can demonstrate their ‘recognition’ of the legitimacy of the governments of other states in the conduct of diplomatic relations. However, in 1990 the Netherlands explicitly adopted the position that ‘we recognise states, not governments’.²⁴

As noted above, in relation to the KAR we are not at the stage of the ‘Montevideo criteria’ and the subsequent question of recognition. However, since it is possible that a unilateral declaration of independence could be issued by the KAR at any time, it would be wise to consider what ‘recognition of a state’ entails from an international law perspective.

Recognition concerns the acceptance of the new state by other states. It may be implicit or explicit. With respect to the role played by recognition, it is generally considered that the ‘constitutive theory’ (under which a state does not come into existence until it has been recognised by other states) does not apply or no longer applies; instead the ‘declaratory theory’ (under which recognition as such is not a condition for a state to be created and to exist as an international legal person) is generally accepted.

It follows that recognition by other states is not one of the objective criteria for statehood (see section 2) and therefore not a condition for the creation of a state. Recognition of a territory as a state does not in principle have any legal consequences under international law; from a legal perspective it is a purely declaratory act.

²⁴ See the letter of the Minister of Foreign Affairs to the President of the House of Representatives, Parliamentary Papers 1989-1990, 21300 V, no. 138.

This also implies that from a legal perspective the KAR *becoming* an independent state should not be confused with the KAR being *recognised* as an independent state: recognition of the KAR as a state would not have any impact on the legal status of the territory of the KAR.

In certain circumstances recognition is nonetheless legally – and, in particular, practically – relevant. For instance, if there are doubts about the objective characteristics of an aspiring state, recognition can serve as a form of supplementary ‘evidence’ for determining whether an entity does indeed fulfil the criteria laid down by international law. The most important factor to consider is that a state that has not been recognised (or widely recognised) will *in practice* be unable to perform juristic acts under international law. Recognition, or the absence of recognition, can therefore have major implications for the concrete manifestation of a state. One well known example is Somaliland: it fulfils the Montevideo criteria without difficulty, but is in fact invisible on the international stage. The considerations involved in recognising the KAR must therefore be weighed up in this light.

For the sake of completeness it should be noted that some scholars have argued that there should be a general international law *obligation* to recognise states that fulfil certain objective criteria. However, no such rule of international law has come into existence. It also cannot be concluded that *not* supporting a people (as opposed to obstructing a people) in its lawful exercise of the right of self-determination – external self-determination, where necessary – constitutes an internationally wrongful act. Conversely, recognising a state that comes into existence in violation of peremptory norms of international law (*jus cogens*) does amount to an internationally wrongful act; in that case there is an obligation of non-recognition.²⁵ In such a case recognition, like recognition at a point when the Montevideo criteria are not or have not yet been fulfilled (sometimes referred to as ‘premature recognition’), can be regarded as wrongful ‘interference in internal affairs’.²⁶

²⁵ See art. 41(2) of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*: ‘No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40 [CAVV: peremptory norms of general international law, i.e. *jus cogens*], nor render aid or assistance in maintaining that situation.’

²⁶ For details of this argument, see e.g. W. Werner (footnote 5), p. 178.

5. SUMMARY

- At present no declaration of independence has been issued by the KAR. Even if a territory does in certain respects fulfil the 'Montevideo criteria', it does not become an independent state automatically (i.e. without the legal intention to this effect).

If a declaration of independence were to be issued at any point in the future, the following set of international law principles would apply:

- Over the past decades there has been broad agreement that the creation of a state may not be accompanied by violations of fundamental rules of international law, in particular *jus cogens*;
- A declaration of independence is not as such contrary to international law (Advisory Opinion on Kosovo, ICJ). In other words, provided that it is not accompanied by violations of fundamental rules of international law or *jus cogens*, an attempt at secession is not contrary to international law.
- The only possible basis under international law for a unilateral secession from Iraq by the KAR (i.e. secession without the consent of the central authorities) would be the exercise of the right of self-determination by the Kurdish population in Iraq. Under international law as it stands, a people can only exercise its right of self-determination 'internally', i.e. within the borders of an existing state, except in cases of colonisation or foreign occupation. The existence of a right of unilateral secession outside these circumstances ('remedial secession') is disputed.
- The prevailing 'declaratory theory' holds that recognition by other states is not a constitutive requirement for the creation of a state. However, it is a matter of fact that a state will be unable to function effectively in its external relations and will therefore be obstructed in its concrete manifestation if recognition is entirely lacking.
- There is no international law obligation to *recognise* an entity as a state if it fulfils the Montevideo criteria, even if the population can be regarded as a people that is lawfully exercising its right of self-determination.
- If the creation of a new state is accompanied by violations of *jus cogens*, there is an obligation of non-recognition (article 41(2) of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts).